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NO. 81 - 1031

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KAREN B. ET AL

Appellees

VERSUS

DAVID TREEN, ET AL

Appellants

APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the grounds that the questions are so insubstantial as not to warrant further argument.

STATEMENT

This is an appeal from a judgment of the United States Court of Appeals for the Fifth Circuit, holding that La.Rev.Stat. §17:2115(B)(1981), a statute authorizing the offering of prayer in the public schools at the beginning of the school day, is unconstitutional, and that a prayer program adopted pursuant to that statute by the Jefferson Parish School Board is also unconstitutional.

In 1980, the Louisiana Legislature enacted La.Rev.Stat. §17:2115(B)(1981). That statute authorizes local school boards to permit the offering of up to five minutes of oral prayer at the beginning of the school day by either a teacher or a

student. On December 3, 1980, the School Board of Jefferson Parish adopted a program to implement that statute. Under that program, the first minute of the school day is devoted to prayer. The teacher selects a student to offer the prayer, or in the absence of volunteers offers the prayer. Students who do not choose to participate in the program are supervised outside the classroom.

On December 4, 1980, three parents sued on behalf of themselves and their children attending Jefferson Parish Public Schools for declaratory and injunctive relief against the operation of the program and the statute. By agreement, implementation of the program was delayed pending a

decision by the Federal District Court for the Eastern District of Louisiana.

On December 17, 1980, a trial on the merits was held. The District Court issued a bench decision dismissing plaintiff's suit on the grounds that that the prayer program did not violate the Constitution. He also issued an injunction pending appeal against implementation of the program. On January 8, 1981 the District Court filed written "Reasons for Judgment."

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. The appeal was heard on an expedited basis, and, on August 5, 1981, the Fifth Circuit reversed the decision of the District Court. Karen

B., et al v. David Treen, et al, 653 F2d.897 (5th Cir. 1981).

Defendants David Treen, Larry Sisung and the Jefferson Parish School Board filed Notice of Appeal to this Court on Spetember 18, 1981.

The prayer program has never been implemented.

ARGUMENT

A. Appellants' First Question Is not Presented By The Facts Of This Case.

Appellant's first question on appeal is:

> Does the denial of use of public school facilities for voluntary prayer before the mandatory segment of the school day begins deny the rights to free speech, equal protection and religious freedom to

> those who wish to participate?
> (Jurisdictional statement at i)

This question impliedly misstates the facts of this case in two ways. First, this case does not present a situation in which prayer is offered before the "mandatory" segment of the school day. Under the guidelines adopted by the Jefferson Parish School Board, and according to the statute, the school day starts, and all students are required to be present, before the prayer period. Some students may remain outside of the classroom or "prayer room", but they will be supervised by school personnel. The statute itself explicitly states that the "first five minutes of the school day" may be

devoted to prayer. Indeed, Appellants acknowledge the fact that the prayer period is part of the mandatory school day in their third question on appeal. This question describes the program as occurring "at the beginning of the school day." (Jurisdictional Statement at i-ii)

Second, the issue of the denial of the use of public shcool facilities for voluntary prayer is not presented by this case. The facts of this case do not resemble those in Brandon v. Board of Education 635 F.2d 971 (2nd Cir. 1980) petition for cert. filed 50 U.S.L.W. 3079 (U.S. Feb. 17, 1981) (No. 80-1396) or Widmar v. Vincent _____ U.S. _____ 50 U.S.L.W. 4062 (Dec. 8, 1981) in which groups of

students asked to use school property for a prayer meeting and were refused. On the contrary, in this case, the school board itself designed, intends to supervise, and even lead the prayer sessions. The sessions were set up under the sponsorship of local government rather than at the request of student participants. There is absolutely no evidence in the record that any group of students ever asked for these prayer sessions.

Apparently appellants intend to argue that the Fifth Circuit's ruling constitutes a "denial of school facilities" to those students who would have chosen to participate in the prayer program. Following that reasoning, one would have to conclude that this Court's

decisions in School District of Arlington Township v. Schempp, 374 U.S. 203 (1963) and Engel v. Vitale, 370 U.S. 421 (1962) resulted in infringement on the free exercise rights of those students who wished to participate in the prayer programs challenged in those cases. This conclusion was clearly rejected by the Court in both cases.

B. Appellant's Second Question Raises an Issue that Has Been Clearly Resolved by this Court.

Appellants have no legal foundation for their suggestion that this Court abandon the test it has developed for evaluating violations of the Establishment Clause of the First Amendment to the United States Constitution. (Jurisdictional

Statement at 19). For eleven years, this Court has consistently followed the Waltz/Lemon test, Waltz v. Tax Commission of the City of New York, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971). No significant problems in applying that test have emerged. The test continues to reflect current legal views and is sufficiently flexible to meet the Court's present needs. In fact, Appellants only rationale for suggesting that the test be abandoned is the fact that they, and the author of a law review article, disapprove of it. (Jurisdictional Statement at 19-21)

This Court has recently reaffirmed the validity of the test, both last session in Stone v. Graham,

449 U.S. 39 (1980) and this session by denying certiorari in Chandler Unified School District v. Collins, 644 F.2d 759 (9th Cir., 1981) cert. den. 50 U.S.L.W. 3212 (Oct. 5, 1981) and in its opinion in Widmer v. Vincent ___U.S. _____ 50 U.S.L.W. 4062. Thus, Appellants' suggestion that the test should be modified does not merit further argument.

C. Appellants' Third Question Has Been Clearly Resolved by Earlier Decisions of This Court.

Appellants third and final question for review is:

> Would the use of public school facilities for voluntary prayer at the beginning of the school day violate the Establishment Clause

under the terms of the Waltz/Lemon test?

(Jurisdictional Statement at i-ii)

That question has been definitively answered by this Court in School District of Arlington Township v. Schempp, 347 U.S. 203 (1963) and Engel v. Vitale, 370 U.S. 421 (1962).

Appellants place great emphasis on the fact that the state has not selected a specific prayer or religious text to be recited by the students and teachers. This emphasis ignores the fact that the Establishment Clause prohibits not only the advancement of a particular religion, but the advancement (or inhibition) of religion in general. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

Appellants further argue that this case presents a substantial, previously unresolved question because participation in the prayer program is voluntary. However, participation in the prayer programs reviewed by this Court in Engel v. Vitale, supra; School District of Arlington Township v. Schempp, supra; and Chamberlain v. Dade County Board of Public Instruction, 377 U.S. 402 (1964) was also "voluntary" in the sense that students were not officially required to participate. Whether children who do not wish to participate first enter the classroom before or after a prayer has been recited is not relevant for purposes of analysis under the Establishment Clause. In either case, the school is

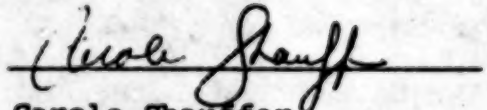
sponsoring and supporting a religious activity.

Neither the fact that the School Board has not selected a specific prayer nor the fact that the prayer is voluntary distinguish this program from other school prayer schemes held to be unconstitutional by this Court. Far from being "not even remotely applicable to the case at bar" as appellants contend (Jurisdictional Statement at 24), the cases previously decided are dispositive of the issues and mandate affirmance of the decision of the Court of Appeals for the Fifth Circuit.

D. Conclusion

Appellants have presented no questions that warrant further

argument. Accordingly, we respectfully submit that the judgment of the Fifth Circuit Court of Appeals should be affirmed.



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CERTIFICATE OF SERVICE

I Carole B Shauffer attorney for Karen B. et al. appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____ 1981, I served by mailing airmail, postage prepaid 3 copies of the foregoing Motion to Affirm on counsel for each appellant.

_____